Supreme Court, U.S.
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No. 00-406

In The
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF CENTRAL COMMUNITY UNIT SCHOOL DISTRICT 301, KANE COUNTY, ILLINOIS,

Petitioner,

v.

CHRISTOPHER SCIONTI,

Respondent.

On Petition For A Writ of Certiorari
To The Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Illinois Circuit Court and Appellate Court decisions Correctly Determined that the Defendant's actions violated both State law and Plaintiff's constitutional rights to substantive due process and procedural due process.

2. Whether the Illinois courts did not apply too rigorous a standard in deciding that the look-alike drug policy was impermissibly vague or unconstitutionally applied to the Plaintiff.

3. Whether the Defendant School District's execution and implementation of its unconstitutional look-alike drug policy clearly rendered it liable under 42 U.S.C. 1983 for Plaintiff's injuries and Defendant waived any *Monell* related defenses by failing to raise them below.

4. Whether the evidence presented clearly supported the trial court's award of damages.

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STATEMENT OF THE CASE

In the fall of 1995, the Plaintiff, Christopher Scionti, was expelled for his entire freshman year from Burlington Central High School under a "look-alike" drug policy. The School District expelled the Plaintiff for allegedly having temporary possession of a bag containing a white powder that tested negative for any controlled substance. The Illinois Second District Appellate Court opinion describes what happened as follows:

> **The record shows that plaintiff was given an opaque envelope and told to check out its contents. Plaintiff placed the envelope in his pocket and attended his first class of the school day. At the beginning of his second class, plaintiff opened the envelope, looked at the substance packaged in a plastic bag, and discarded it in the back of the classroom. Plaintiff's conduct indicates that, rather than knowingly possessing a drug or a look-alike substance, he disposed of it as soon as he realized that the envelope might contain illegal drugs. (A-13)[1]**

The Defendant's Statement of the Case contains numerous false statements and omissions of the evidence actually presented to the trial court. In its

[1] This citation and others similarly styled are to the Appendix to Defendant's Petition.

appeals to the Second District Appellate Court in Illinois, and the Illinois Supreme Court, the Defendant provided citations only to its own pleadings for its statement of the facts, rather than a single citation to any evidence that was actually introduced during the trial. Throughout these proceedings, and now here in an effort to obtain review in this Court, the Defendant's version of the facts is not based upon the trial court record. Instead, Defendant's factual account of the alleged incident is taken exclusively from statements contained in a memorandum that was given to the hearing officer by the school administrators.

The Illinois Appellate Court specifically recognized that the Defendant's distortion of the facts could be traced back even before the trial, to its version of Defendant's hearing officer's report. The Appellate Court's opinion notes that the suggestion by the Defendant that the Plaintiff knew what the envelope contained and showed it to other students while speculating as to its contents "misstates and embellishes the factual findings of defendant's hearing officer." (A-13).

None of the "student witnesses" referred to in Defendant's Statement of The Case ever testified at *any* hearing, including the several days of trial on Plaintiff's Section 1983 claims. Those student statements appear only in the school administrators' memorandum referred to above. Even Plaintiff's alleged statements to other students referred to in the third paragraph of Defendant's Statement of The Case are taken from that memorandum. Those alleged statements were never presented through any testimony to the trial court. The trial court's written opinion carefully notes that

"[w]hile there was hearsay testimony of unidentified witnesses at the school hearing that he showed the substance to others or that he tasted it, there was no evidence at trial to support those findings in the report of the hearing officer." (A-24).

From the evidence actually presented at trial, the trial court and the appellate court found that the Defendant school district's policy of expulsion for possession of a look-alike drug was unconstitutionally vague as written for several reasons. First, the courts found the policy impermissibly vague because the terms "look-alike" and "possession" were not defined at all in the student/parent handbook. (A-12). Second, and most importantly, the courts determined the policy could not possibly provide students with sufficient warning as to what conduct it prohibited because the testimony of the three administrators charged with executing the policy established that even they were unable to agree upon the meaning of the term "look-alike drug" in the context of the policy, and that the two senior administrators of the school district disagreed upon whether a student's possession of a "look-alike drug" must be "knowing" in order to constitute "gross misconduct." (A-13).

Both the trial court and the appellate court went further, however, finding that even assuming the policy used to expel the Plaintiff was sufficiently precise, it was unconstitutionally applied to the Plaintiff. The trial court found that the approach used by the school administrators in this case lead "to trampling the constitutional rights of the plaintiff Christopher Scionti." (A-24). Both courts noted that although there were alternative disciplinary measures available to the

Defendant, it unreasonably failed to use them in this case. In analyzing the Defendant's decision not to make those alternatives available the appellate court observed that "defendant appears to have made an example of plaintiff for conduct which cannot be termed, under any stretch of the imagination, as 'gross misconduct'". (A-14). The trial court characterized the Defendant school district's behavior as "throwing the plaintiff to the wolves." (A-25). The trial court specifically found that the "School Board and the Administration over reacted to the so-called "possession" episode" and that the punishment imposed upon the Plaintiff "clearly shocks the conscience of the court." (A-27). The appellate court concluded that "expulsion, therefore was wholly unwarranted and accordingly, we determine that defendant unconstitutionally deprived plaintiff of his property interest in his education in this case through its arbitrary application of its drug policy and excessive punishment." (A-14).

The appellate court also found that the actions of the Defendant denied the Plaintiff the most minimal procedural due process safeguards. The court noted that the school district's refusal to identify the witnesses against the plaintiff and allow him to cross-examine them, given the fact that they were the only witnesses who actually observed the incident, violated minimum due process. The court also found "the administration's vouching for the reliability and credibility of the witnesses to be especially offensive to traditional notions of due process." (A-17). The court held that "Defendant provided plaintiff with a kangaroo court (as evidenced by Oleson's [the assistant principal] assertion to plaintiff's father that the school

"100 percent get[s] rid of every kid" it wants to and that it had never lost an expulsion hearing)." (A-16).

The trial court specifically found that the actions of the Defendant school district resulted in substantial injuries and losses. The trial court awarded the Plaintiff $153,660 in damages for his actual losses, including the past and future costs of psychological treatment, costs for alternative education, loss of social opportunities and emotional distress. (A-27). The trial court specifically found Defendant's expert's testimony on damages and their causation to have no credibility whatsoever. On the other hand, the trial court found Plaintiff's expert's testimony both as to the cause of the damages and as to the nature and extent of the Plaintiff's mental and emotional injuries to be very significant, and accorded it great weight. (A-27).

The appellate court also found the trial court's determination that the Plaintiff's injuries and losses resulted from Plaintiff's improper expulsion "was well founded from consideration of the evidence presented in this case."(A-19). The court further noted that Defendant's arguments regarding causation and damages were merely an invitation for the court to substitute its judgment for the factual determinations made by the trial court, and accordingly the court declined to do so. (A-19-A-20).

On May 31, 2000 the Illinois Supreme Court denied Defendant's Petition for Leave to Appeal. (A-1).

ARGUMENT

I. The Illinois Circuit Court and Appellate Court Decisions Correctly Determined That The Defendant's Actions Violated Both State Law and Plaintiff's Constitutional Rights to Substantive Due Process and Procedural Due Process.

A plaintiff may prevail on a substantive due process claim under Section 1983 by showing that the defendant intentionally or recklessly deprived him of a constitutional right. *Armstrong v. Squadrito,* 152 F.3d 564, 570 (7th Cir. 1998). Where the allegedly unconstitutional action results from the execution or implementation of a governmental entity's official policies, rules or regulations, the entity itself may be held directly liable under 42 U.S.C. 1983. *Board of County Commissioners v. Brown,* 520 U.S. 397,405, 117 S.Ct. 1382, 1389, 137 L.Ed.2d 626 (1997); see also, *Allen v. Board of Trustees of Community College District No. 508,* 285 Ill.App.3d 1031, 1037 (1996). Conduct that "shocks the conscience," actions taken with "deliberate indifference" to the Plaintiff's rights, or "truly irrational" governmental action deprives a person of his substantive due process rights. *Board v. Brown,* 520 U.S., at 405, 117 S.Ct. at 1389.

Defendant first argues that this case should be reviewed because it believes the Illinois courts' rulings on Plaintiff's procedural due process rights to know the identity of the witnesses against him, and to cross-examine them, conflicts with the decisions of the Seventh and Sixth Circuit Court of Appeals in *Linwood v. Board of Education of City of Peoria,* 463 F.2d 763 (7th Cir. 1972) and *Newsome v. Batavia Local School District,*

842 F.2d 920 (6th Cir. 1998). As discussed below, this argument is without merit because this case is so factually dissimilar, and because the Illinois courts held that *all* of the Defendant's actions combined to provide the Plaintiff with a "kangaroo court" where he had no hope of affecting the outcome. (A-17)

The Defendant's quarrel with the Illinois courts' procedural due process rulings ignores the overwhelming evidence that Defendant violated Plaintiff's substantive due process rights. Both lower courts found that the school district's deliberate indifference to Plaintiff's rights, its unconstitutional disciplinary policy, as well as its actions which "shocked the conscience" of the trial court, as exemplified by the school administration's declared intention to "100 percent get rid of every kid" it wanted to, all contributed to the deprivation of Plaintiff's rights. It was not just the lack of procedural safeguards the lower courts found to be arbitrary and capricious. It was the Defendant's arbitrary application of its impermissibly vague drug policy, and its use of a wholly unwarranted punishment which both the trial and appellate court found resulted in an intentional deprivation of the Plaintiff's right to an education. Thus, even if Defendant could obtain a review of the procedural due process rulings, we respectfully submit that the egregious and numerous violations of Plaintiff's substantive due process rights proved by the evidence alone justify the decisions below.

The decision in *Linwood, supra*, is not, however, in conflict with the rulings below. In *Linwood*, the written procedural rules of the school district specifically provided that both the student and his

attorney would have the right to cross-examine witnesses. The *Linwood* court indicated that the student did not have a pre-hearing right to have the district produce a list of witnesses and their proposed testimony. Nowhere, however, did the *Linwood* court even address, much less decide, that a student could be expelled by hearsay testimony of unidentified student witnesses presented only in a memorandum by school administrators. In short, nothing in the *Linwood* decision is in conflict with the rulings in this case.

Defendant's contention that the decision in this case is in conflict with the Sixth Circuit Court of Appeals ruling in *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1998) is also based upon a misunderstanding of the *Newsome* ruling, and its application to the pertinent facts in this matter. In *Newsome*, the Court of Appeals reversed the District Court's dismissal of a student's claim for damages for an improper expulsion, finding that the student was denied minimal procedural due process when an administrator secretly presented evidence to the school board at his expulsion hearing. Id., at 927-928. The superintendent, in closed session, told the school board that Plaintiff had confessed his participation in the incident to an alcohol and drug counselor. The counselor, however, submitted an affidavit to the district court denying that any such confession ever occurred. The *Newsome* court ruled that Plaintiff was denied procedural due process, because "procedural due process, at a minimum, requires notice of both the charges and the evidence against the individual." Id. at 928, fn.7. The Court also ruled Plaintiff was not denied procedural due process because he was not allowed to cross-examine two student witnesses.

Defendant reasons that because the Illinois courts found the procedure employed to expel Plaintiff included a refusal to allow cross-examination of student witnesses, the decisions are in conflict with *Newsome*. Careful review of the appellate court's discussion of the procedural due process issues reveals, however, that it was the refusal to allow cross-examination *coupled* with the administration's vouching for the reliability and credibility of those witnesses, under the particular facts of this case which the court found offensive.

In *Colquitt v. Rich Township High School*, 298 Ill. App. 3d 856 (1st Dist. 1998), the Appellate Court applied the three prong test articulated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 334 96 S.Ct. 893, 902 (1976) to determine that a student was denied procedural due process. In *Colquitt*, just as in this case, the student witnesses were the only witnesses to the alleged misconduct, but did not testify. Instead, a school administrator presented their testimony and vouched for its credibility. The student and his attorney were prevented from learning the identity of the student witnesses and were not allowed to cross-examine them. The *Colquitt* court, relying on the *Eldridge* factors, concluded that the risk of error from the lack of adversarial testimony of witnesses in that case, substantially outweighed the countervailing interests of allowing a student to be convicted of gross misconduct through the admission of such unassailable hearsay statements.

Both *Colquitt* and the decision in this case are consistent with the well outlined principles in *Eldridge*.

This Court recognized that "due process is a flexible concept determined by the nature of the interest affected and the context in which the alleged deprivation occurs." Id. 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976). Defendant, however, seeks to undermine that flexibility by erroneously suggesting the adoption of an inflexible rule; i.e.; in no school expulsion case, can the identity of student witnesses or their cross-examination ever be constitutionally required. Just as the Illinois Appellate Court recognized, Defendant has failed to tie its abstract propositions to the actual circumstances of this case. (A-14, A-15). It has failed throughout these proceedings to demonstrate how Plaintiff was afforded procedural due process by the "kangaroo court" that was utilized. Specifically, it has failed to demonstrate to any Court how, given the procedure that was employed, any student could have possibly defended the charges. Under these circumstances, the decisions below are clearly not in conflict with the rulings of this Court or the Sixth and Seventh Circuit Court of Appeals. For this additional reason, Defendant's petition should be denied.

None of this, however, should provide this Court with a reason to review this case, because ironically, the "evidence" which the Defendant presented to the hearing officer through the deprivation of Plaintiff's procedural due process rights, still did not demonstrate that he committed an act of gross misconduct for which he could have been constitutionally expelled. Both the trial court and appellate court admonished the Defendant that its "evidence" that Plaintiff tasted the substance before he discarded it, or that he did not think the substance was real, or did not think that it was "coke," did not under

any stretch of imagination, establish that Plaintiff knowingly possessed a look-alike drug. (A-13, A-17-18, A-33). The trial court pointed out that our television programs and motion pictures consistently depict both "good guys and bad guys including police officers" engaging in the kind of activity the administration contended through this "evidence" that the Plaintiff engaged in. (A-33).

In short, irrespective of whether or not Defendant violated Plaintiff's procedural due process rights, the judgment entered in this cause is fully supported by the clear determination that the Plaintiff's expulsion pursuant to Defendant's look-alike drug policy violated his substantive due process rights. Except to complain that its disciplinary policy should be exempt from *any* judicial scrutiny, this Defendant has totally failed to offer a basis for overturning the lower courts' substantive due process rulings. Moreover, Defendant has failed to explain, irrespective of whether the Plaintiff's procedural due process rights were violated, how an expulsion of a student for temporary innocent possession of a non-controlled substance could ever be justified. For this reason as well, this Court should deny the Defendant's petition.

II. The Illinois Courts Did Not Apply Too Rigorous a Standard in Deciding That The Look-alike Drug Policy Was Impermissibly Vague or Unconstitutionally Applied to the Plaintiff.

Defendant also seeks review of this case, because it believes the Illinois courts required the school district's rules and the application of those rules to satisfy the standards required of criminal statutes. The

Defendant urges that by overturning Plaintiff's expulsion and awarding damages, the courts substituted their findings for that of the administration and school board. Because the lower court's written decisions so clearly do not support these claims, neither is a basis for this Court to grant certiorari.

First, the Defendant's position overlooks the appellate court's explicit statement that "[t]he rules at issue in this case are not, however, criminal statutes; rather they are school disciplinary rules and as such, they are not required to have the same precision as a criminal statute."(A-11 citing, *Wiemerslage v. Maine Township High School District 207*, 29 F.3d 1149,1152 (7th Cir. 1994)). The appellate court observed that the rules must provide sufficient certainty, fair warning and notice of what conduct is prohibited as measured by *common understanding*. Id. The court further noted "in order to pass constitutional muster, a rule must apprise the community of what conduct is prohibited and it must not leave those charged with implementing the rule too much discretion, so as to result in oppressive or discriminatory application". (A-11)

The Illinois courts in this case looked carefully at the testimony of the school administrators (something Defendant's petition predictably fails to discuss at all) and concluded that the policy was vague not only because the administrators charged with implementing the rule were left with too much discretion, but also because they could not even reach a consensus as to what conduct the policy prohibited. How a freshman student, such as the Plaintiff, in his first months in the district, was supposed to have been able to discern what conduct was prohibited, when those in charge of

enforcing the rule could not, is an *enigma* this Defendant has never, and we submit will never be able to explain.

The Defendant's policy was measured against a school standard, not a criminal standard. The Defendant's policy clearly failed the school standard. That is why the lower courts found it to be unconstitutional. Requiring school administrators to understand the rules they enforce, is no more onerous a burden than expecting students to understand the rules that govern their conduct.

In light of the above, the Defendant's contention that the lower courts applied a criminal standard to the look-alike drug policy is nothing more than another blatant false statement about the case. We respectfully submit that the reasons this Court grants certiorari should not be expanded to include a petitioner's misrepresentation of the record.

The lower courts also did not merely substitute their judgment for that of the administrators and the school board. They recognized that schools are entitled to discretion in disciplinary matters but also were quick to note that this discretion is not without limits. See, e.g., *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 434 (1990). The Illinois courts found that expulsion was wholly unwarranted in this case and accordingly determined that the defendant unconstitutionally deprived plaintiff of his property interest in education. (A-14).

It is actually the Defendant that now asks this Court to substitute its judgment for the factual

determinations made by the trial court. Defendant wants this Court to step in and rule that on the basis of only the memorandum its administrators gave to the hearing officer, the school district's expulsion of the Plaintiff should be upheld. Defendant would have this Court simply ignore the testimony adduced during the many days of trial including the crucial testimony of the defendant administrators that exposed their "deliberate indifference" to Plaintiff's rights. Although it is certainly understandable why the school district in this case would prefer to base its appeal to this Court on something other than the evidentiary record, we urge this Court to decline to accept Defendant's invitation.

III. The Defendant School District's Execution and Implementation of Its Unconstitutional Look-alike Drug Policy Clearly Rendered It Liable Under 42 U.S.C. 1983 for Plaintiff's Injuries and Defendant Waived any *Monell* Related Defenses By Failing to Raise Them Below.

Defendant next concedes that school districts, like other governmental entities, can be held liable for injuries that result from an unconstitutional execution or implementation of official policies, rules, or regulations. *Monell v. Department of Social Services of the City of New York*, 436 US 658, 56 L ED 2D 611, 98 S.CT. 2018; *Armstrong v. Squadrito*, 152 F.3d 564, 570 (7th Cir. 1998). However, Defendant then makes another blatantly false statement about the record below to attempt to create a basis for review in this Court. At page 20 of its petition, the Defendant makes the following bizarre assertion: "In the instant case, a review of the Illinois Circuit and Appellate Court

opinions reveals that an analysis of any custom, policy or practice of the School District is conspicuously absent."

Obviously, the same alarming lack of understanding that caused this school district to believe it could impose expulsion upon a child for conduct that could not possibly have violated its arbitrary look-alike drug policy, now prevents the district from recalling that both the trial court and appellate court devoted substantial portions of their written opinions to a careful and thoughtful analysis of Defendant's look-alike drug policy, both as it was written, and as it was applied to the Plaintiff. One truly wonders how Petitioner could, in good faith, first argue to this Court that the lower courts applied a criminal standard to evaluate its policy, and in the very next section of its brief make the absurd statement that the courts' opinions are devoid of any evaluation of any school district policy.

Defendant complains that "it strains logic and demeans the judicial system when a court subsequently concludes that a school district's rule against possessing look-alike drugs is unconstitutionally vague." Defendant's statement reveals its arrogant and erroneous belief that no court anywhere should ever be able to evaluate whether any part of any school district's disciplinary policy is unconstitutional or whether its execution and implementation has resulted in an unconstitutional deprivation. It is well established that a rule or regulation is impossibly vague and violates due process if it leaves the regulated community unsure of what conduct is prohibited or fails to provide adequate guidelines to those charged

with its enforcement. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 163 (1993). The fact that the Illinois courts found the policy and rules at issue in this case could not pass even a school community standard, neither strains logic nor demeans the judicial system.

There cannot be any question that the deprivation of Plaintiff's rights resulted directly from the execution and implementation of the Defendant School District's rules regarding look-alike drugs contained in its official disciplinary policy. Nor can there be any question that the school district's written policy and its arbitrary enforcement of that policy were the "moving force" behind Plaintiff's injuries. Under these circumstances the Defendant school district is clearly liable for the Plaintiff's injuries.

In any event, Defendant has waived any claim that the evidence adduced in this case was not sufficient to impose municipal liability against the school district under *Monell*. Attached as Plaintiff's Appendix A, is an excerpt of Plaintiff's brief before the Illinois Appellate Court detailing the affirmative defenses raised in the trial court that were not mentioned on appeal. This Court has repeatedly held that it will not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) (per curiam); cf. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). Clearly, the Defendant did not present the arguments below that it now seeks to have this Court consider. Accordingly, this Court should not grant certiorari to review

Defendant's latent claim that it is not subject to liability under *Monell*.

IV. The Evidence Presented Clearly Supported The Trial Court's Award of Damages.

Finally, Defendant asks this Court to reweigh the evidence presented at trial regarding damages. Defendant relies on this Court's decision in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978) for its contention that the Illinois courts erred in awarding Plaintiff damages for the injuries he sustained as a result of his improper expulsion. Defendant's reliance on *Carey* is misplaced.

In *Carey*, this Court held that mental and emotional distress is compensable under Section 1983 for a deprivation of due process where the evidence demonstrates the injuries resulted from the deprivation. 435 U.S. 247, 263, 98 S.Ct. 1042, 1052. The Court of Appeals' decision in that case seemed to infer that injury could always be "presumed" to flow from every denial of due process, in the same manner that actual damages are often "presumed" in a *per se* defamation claim. This Court rejected that analysis, holding "neither the likelihood of such injury, nor the difficulty in proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused." Id. Because *no* evidence on damages had been presented in *Carey*, the Court remanded the case with instructions that if the school district in that case proved that the student suspension was justified, the student would be entitled to recover only $1 in nominal damages for the due process violations.

Nothing in *Carey*, however, supports the view advanced by the Defendant in this case that the Plaintiff is entitled to only nominal damages. Here, as reflected in both the trial court and appellate court opinions, the evidence overwhelmingly established that Plaintiff's mental and emotional injuries were caused by the deprivation of Plaintiff's rights. Moreover, the record below convincingly demonstrates that under no "stretch of the imagination" was Plaintiff's outright expulsion justified. Thus, there is no basis whatsoever for finding that the alleged injuries were attributable to a *justified* deprivation, and accordingly, Defendant's claim that Plaintiff's damages should be reduced to $1.00 is incorrect.

Defendant's argument is again nothing more than a request that this Court re-weigh the factual and credibility determinations the trial court made in both concluding that Plaintiff's injuries were casually linked to the Defendant's actions and in determining the amount of damages to be awarded. The Illinois Appellate Court already considered and rejected outright Defendant's claim that the evidence adduced did not support the trial court's award of damages. The Appellate Court specifically found that the Defendant's request was nothing more than an invitation to have the Appellate Court substitute its judgment for the factual determinations of the trial court, which the Appellate Court declined to do. This Court should likewise deny Defendant's Petition.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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